

American Postal Workers Union, Madison Area Local, AFL-CIO (United States Postal Service) and Patrick T. Wall. Case 30-CB-4355(P)

April 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS WALSH
AND ACOSTA

On May 25, 2001, Administrative Law Judge William N. Cates issued the attached bench decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

We affirm the judge's conclusion that the Respondent did not unlawfully select or encourage certain employees to file grievances to the exclusion of other employees who were similarly situated to the grievants. In doing so, we note, as did the judge, that employee Darrell Linke testified that he asked Union Steward Carol Muenkel why not all of the flat mail sorters who worked on the linear integrated parcel sorter (LIPS) machine were included as part of the grievance; that Muenkel replied that individual grievances were filed to "make the management notice the grievance more;" and that Muenkel also told him that "[in] filing individual grievances nonunion members would not be included." Linke did not elaborate on this testimony. Indeed, he testified that after Muenkel made the above statement to him, he "basically let it go at that." Although the judge restated Linke's above testimony in his recitation of facts and referred to it again in his summary of the evidence, he neither discredited it nor expressly discounted it in light of the weight of contrary, exculpatory evidence.

While Linke's testimony is not contradicted, it is also not corroborated. Two other employees, Bill Wedeward and Charging Party Patrick Wall, also complained to Muenkel about the grievance settlement, but, unlike Linke, neither testified that Muenkel told them that individual grievances were filed to exclude nonunion mem-

bers from participating. There is no other evidence that the Respondent arbitrarily, unfairly, or discriminatorily prevented or impeded anyone—union member or not—from filing a grievance. Indeed, as the judge found and we agree, the preponderance of the relevant evidence is to the contrary.² More specifically, we agree with the judge that the record establishes that the Respondent proffered a reasonable explanation for filing individual grievances rather than an all-inclusive blanket grievance—the reasonably anticipated persuasive impact that numerous individual grievances would have on management.

Finally, we acknowledge that none of the approximately 76 employees who filed grievances were non-union members. However, unit employees were overwhelmingly union members. Indeed, only 5 percent were not. Thus, of the approximately 80 affected employees who did not file grievances, only a small portion were nonunion members.³ It is not reasonable to believe that the Respondent would somehow intentionally subvert or circumvent the opportunity of many of its members to file grievances just to make certain that a few nonmembers also did not get such an opportunity, particularly where, as here, there was at the time in question no certainty that any of the grievances would be resolved favorably to the grievants.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

CHAIRMAN BATTISTA, concurring.

I concur in the result. In my view, the Union offered a reasonable explanation as to why it chose to have many individual grievances, rather than have one blanket grievance. However, it was arguably unlawful for the Union to encourage members, and not nonmembers, to be the individual grievance-filers.¹ Notwithstanding this, I agree that there is no violation. There is no evidence that nonmembers were precluded from filing individual grievances, and no evidence that the Union would refuse to process any such grievances. In these circumstances, I concur in finding no violation.

² Thus, we disagree with our colleague's implication that the Respondent encouraged its members, but not nonmembers, to file individual grievances.

³ The precise number of nonmembers among the employees who worked on the LIPS machine during the relevant time period was not established. We note that Charging Party Wall was a union member at the time that the grievances were filed.

¹ I am not suggesting that the Union prevented or impeded anyone from filing a grievance. I am merely suggesting, based on Linke's testimony, that the Union affirmatively asked members, rather than nonmembers, to file grievances.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Angela B. Jaenke, Esq. and Paul Bosanac, Esq., for the General Counsel.

Bruce M. Davey, Esq., for the Union.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard this case in trial in Madison, Wisconsin, on April 30 and May 1, 2001. The case alleges the American Postal Workers Union, Madison Wisconsin Area Local, AFL-CIO (Union), selectively encouraged some unit employees, for which it was the exclusive bargaining representative, to file grievances regarding a specific work change, while specifically excluding other employees from doing so. It is alleged the Union failed to fairly represent the employees it excluded from filing grievances for reasons that were unfair and arbitrary and in breach of the fiduciary duty it owed to all unit employees it represents. The actions and/or inaction of the Union are alleged to violate Section 8(b)(1)(A) of the National Labor Relations Act (Act). All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses.¹ At the close of trial and after oral argument by Government and union counsel, I issued a Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (Board) Rules and Regulations setting forth findings of fact and conclusions of law.

For the reasons (including credibility determinations), stated by me on the record at the close of the trial, I found the Government failed to prove the Union failed to fairly represent Charging Party Patrick T. Wall, an individual (Charging Party Wall or Wall), or some 80 other similarly affected employees. The evidence did not establish any employees were unlawfully excluded from filing grievances nor did the evidence demonstrate any conduct on the part of the Union that would constitute unfair and arbitrary action on its part pertaining to filing grievances. The Government likewise failed to demonstrate the Union violated its fiduciary duty to the employees it represents. The evidence did, however, establish that Charging Party Wall was a member of the Union during material times herein, was aware of the problems that gave rise to the filing of the underlying grievances, was timely told to file a grievance but failed to do so. The evidence established certain other employees similarly situated to Wall failed to file grievances. The evidence tended to indicate that any soliciting of grievances by the Union was openly made to all employees present on any of the occasions of soliciting grievances with no pattern shown of selective solicitations aimed at including or excluding anyone. The evidence at best demonstrated approximately one-half of the unit employees chose to file grievances over the underlying work

changes while the other half did not and it was only after the Union obtained a favorable settlement for those who filed grievances that the other employees became concerned about their failure to do so. I recommended the complaint be dismissed in its entirety.

I certify the accuracy of the portion of the transcript, as corrected,² pages 196 to 220, containing my bench decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

CONCLUSION OF LAW

The Board has jurisdiction in this matter under Section 1209 of the Postal Reorganization Act. The Union is a labor organization within the meaning of Section 2(5) of the Act and has not violated the Act in any manner set forth in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The unfair labor practice complaint is dismissed.

APPENDIX A

DECISION

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This is my decision in American Postal Workers Union Madison, Wisconsin Area Local, AFL-CIO (United States Postal Service) hereinafter union in Case 30-CB-4355(P). First I wish to thank counsel for their presentation of the evidence. If you will think back over the trial I have not asked any questions, perhaps one or two for clarification only. That always reflects well on counsel and each of you are a credit to the party or position that you represent. May I also state that it has been a pleasure being in Madison, Wisconsin.

This is an unfair labor practice case prosecuted by the National Labor Relations Board, hereinafter Board, General Counsel, hereinafter Government counsel, acting through the Regional Director for Region 30 of the Board following an investigation by Region 30's staff. The Regional Director for Region 30 of the Board issued a complaint and notice of hearing, hereinafter complaint, on June 29, 2000 based upon an unfair labor practice charge filed by Patrick T. Wall, an individual, hereinafter Charging Party Wall or Wall, on April 4, 2000.

Certain facts herein are admitted, stipulated or not in

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dispute. I am required to set forth certain of those facts which I now do. The parties admit and I find the Board has jurisdiction in this matter under Section 1209 of the Postal Reorganization Act. The parties admit and I find the union is a labor organization within the meaning of Section 2(5) of the Act. The parties

¹ On May 17, 2001, the Government filed a motion to set aside bench decision, permit amendment of the complaint, and reopen the record. The Government's motion is denied. The Government was aware it had no authority to amend its complaint herein at the time it elected to proceed to trial. If the Government believed its proposed amendment to be critical to its case, it could have postponed the trial until it had authority to do so. The Government chose to proceed at its peril and may not now force the Union to respond further.

² I have corrected the transcript pages containing my bench decision and the corrections are as reflected in attached appendix B. [Omitted from publication.]

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

admit that the following union officials are agents of the union within the meaning of Section 2(13) of the Act. Namely local president Steven G. Raymer, local vice president Martin Mater and stewards Pam Langlitz, L-A-N-G-L-I-T-Z, Mike McCarthy, M-C-C-A-R-T-H-Y, Dennis Landen, L-A-N-D-E-N, Greg Wood, Bret Wersland, W-E-R-S-L-A-N-D, Carol Muenkel, M-U-E-N-K-E-L, Edgar Reeves, R-E-E-V-E-S, and Paul Muenkel, M-U-E-N-K-E-L.

The parties admit that by virtue of Section 9(a) of the Act the union has been the exclusive collective bargaining representative of all postal clerks employed by the United States Postal Service, hereinafter Postal Service, at its Madison, Wisconsin facility, hereinafter called the unit. At all times material herein the union and Postal Service have maintained and enforced a collective bargaining agreement covering conditions of employment in the unit and contains among other provisions a grievance and arbitration procedure.

It is alleged that in September and October, 1999 the union selected and/or encouraged 76 employees to file and thereafter process grievances related to the Postal Service's

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implementation of a new keypad on the linear integrated sorter machine, hereinafter sometimes referred to as the LIPS machine, to the exclusion of the Charging Party and approximately 80 other employees who were similarly affected.

It is alleged Charging Party Wall in March, 2000 saw a list posted by the union stating the union and the Postal Service had reached a settlement of the 76 filed grievances just referred to and as part of the settlement each of the 76 employees who had filed grievances were awarded \$160.00

It is alleged the union's conduct in the selection and/or encouraging of the 87 employees to file and thereafter process the grievances related to the LIPS machine to the exclusion of Wall and the approximately 80 other employees similar situated constitutes a failure on the part of the union to fairly represent Charging Party Wall and the other similarly situated employees for reasons that are unfair and arbitrary and has breached the fiduciary duty the union owes to the employees it represents.

It is further alleged that the union by its conduct I have just described has restrained and coerced and is restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act and the Union thereby has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

Before I get into the facts and a discussion of those let

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me state that this case as in most cases requires some credibility resolutions. In arriving at my credibility resolutions I state that I carefully observed the witnesses as they testified and I have utilized such in arriving at the facts herein. I have also considered each witness' testimony in relation to other witnesses' testimony and in light of the exhibits presented herein. If there is any evidence that might seem to contradict the credited facts I shall set forth I have not ignored such evidence but rather have discredited or rejected it as not reliable or trustworthy. I have considered the entire record in arriving at the facts herein.

This case centers around or grows out of the Postal Service's implementation of a new keypad on its at the time new linear integrated parcel sorting machine some time in late 1999, perhaps around September of that year. The actual machine may have been installed and in the process of being advanced as early as 1998. The LIPS machine was able to accommodate small packages and bundles of mail for processing with operators utilizing a keypad.

The LIPS machine was designated or at least in this trial referred to from time to time as an FSM 1000 machine. The LIPS machine is approximately 80 to 90 feet long with two conveyor belts, one about four feet off the ground while the other is about seven feet off the ground. The LIPS machine requires approximately seven employees to operate with the employees

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rotating essentially between the task of keying the mail and of sweeping the machine. Keying the mail simply means entering into the keypad the destination by number of the mail and the sweeping of the machine simply means emptying the sacks or bins as they are filled.

More specifically keying the mail consists of the FSM 1000 machine operator who determines from a label on the parcel where the package is to be shipped and then keying that number into the keypad and the package is then directed to bins or bags corresponding to the area the parcel is designated to be sent. More specifically with respect to the sweepers are those employees who kept the filled parcel bags taken away from the machine and replacing them with empty bags or containers.

According to local union president Steven G. Raymer the union and Postal Service negotiated regarding who or what category of employees would be utilized to staff the 1000 LIPS machine. The flat mail sorters were chosen for the task. It appears at some point during the fall of 1999 the Postal Service changed the keypad on the 1000 LIPS machine without notice to or negotiating with the union. The changes, while not fully described in this record, at least indicates that the position zero was moved on the keypad. It appears the keypad changes caused great concern for the involved employees.

The dissatisfaction resulted in a number of grievances being filed over the Postal Service's changing of the keypad and

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perhaps to some extent the installation of a voice activated system instead of or in addition to the keypad system of operation. Some 77 or perhaps 76 individual grievances were filed in late September or early October, 1999 with the union related to these new keypad and voice activated system changes for the LIPS machine.

This case then comes to focus around the grievances with the Government contending the union arbitrarily and discriminatorily solicited employees to file the grievances in question so that certain unit employees were rewarded while others were precluded from participating in or left out of any settlement of the grievances. The union contends everyone was free to file grievances if they were affected by the changes and that all grievances filed were processed and a settlement was arrived at

with the Postal Service whereby each affected employee who filed a grievance was paid \$160.00 by the Postal System.

The grievances were settled by the union and the Postal Service on or about March 9, 2000. In addition to the \$160.00 per grievant award there was certain language that was in the settlement reference the LIPS machine operators that the union considered very favorable to the employees.

The union posted a notice on or about March 14, 2000 on the union's bulletin board at the main postal facility. The terms of the settlement agreement that I have just made reference to

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which among other things awarded the employees filing the grievances \$160.00 were set forth. It was around this time that certain flat sorter machine operators realized they were not numbered among those that had been awarded \$160.00 and commenced to question the union as to why they were not included.

The Government called six and a half year flat sorter machine operator Bill Wedeward, W-E-D-E-W-A-R-D, who testified he started working on the LIPS machine in the fall of 1998 one or two days per week because employees were rotated onto and off of LIPS machine operations. Wedeward testified the Postal Service management discussed the introduction of the LIPS machine as early as the fall of 1998 and that union stewards or union officials were present when the Postal Service management did so.

Wedeward testified the union knew there were employee problems and concerns with the operation of the LIPS machine from its early introduction in Madison, Wisconsin. Wedeward testified that it was such that postal supervisor Meinholz, M-E-I-N-H-O-L-Z, asked the employees if they had any ideas to help make the LIPS machine work better. Wedeward testified he verbally raised LIPS machine concerns with the union stewards. Wedeward testified the keypad changes the Postal Service brought about were important to the operators but he did not ask to file a grievance related thereto, nor was he asked by the union to file a grievance.

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Wedeward testified he observed the posting on the union bulletin board of the settlement of the grievance related to the LIPS machine, which notice was posted on or about March 14, 2000. Flat sorter machine operator Wedeward testified someone had inked in on the bottom of the settlement notice posted on the union bulletin board the words "It pays to be a union member". Wedeward testified that two or three days after the settlement notice was posted he spoke with union steward Carol Muenkel, M-U-E-N-K-E-L, to ask how this settlement happened and why he was not included.

According to Wedeward the union steward replied that initially a couple of people filed grievances and thereafter union president Raymer held a meeting with the union stewards and asked them to solicit as many grievances on the subject matter as they could so that they could possibly have 70, 80 or perhaps 90 grievances and that it would carry more weight with the Postal Service if the situation came to the Postal Service's attention in that manner.

Wedeward asked if he had any recourse at that time and union steward Muenkel told him no. Wedeward testified that on April the 12th, 2000 he telephoned union president Raymer and in the 2 or 3 minute phone call with Raymer he asked why all of the flat sorter machine operators were not included in the settlement. According to Wedeward Raymer asked if he had filed a grievance and he acknowledged he had not. Raymer told

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Wedeward everyone on the settlement listed on the bulletin board that received \$160.00 came forward and filed an individual grievance with the union.

Wedeward asked why the union did not file a class action grievance and Raymer according to Wedeward responded "There would have been no clout in a class action grievance". Raymer told Wedeward there was nothing that could be done for him at that time and told Wedeward he should be happy with the verbiage in the settlement because it was very helpful to the flat sorter machine operators.

Wedeward testified he spoke with union steward Carol Muenkel on April 13, 2000 while at the LIPS 1000 machine. Wedeward testified he told the union steward that union president Raymer had said that those who got a settlement had all come forward and filed individual grievances and that that was different from what she had told him. Wedeward stated to Muenkel "He's lying to me, isn't he?" According to Wedeward the union steward replied that union president Raymer "sometimes said things and then forgot them".

According to Wedeward union steward Muenkel contended the stewards were solicited to solicit grievances. However, he acknowledged she did not say that union president Raymer told the stewards to solicit any particular employees. Wedeward acknowledged on cross-examination that during the times in question herein he was a union member. The Government presented

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flat sorter machine operator William Hutton who testified he was an 8 year employee with the Postal Service and had been a union member for the entire time.

Hutton testified he worked the LIPS machine one or two times a week since its introduction and had even trained others to work on the machine. Hutton testified it was the changes to the keypad on the LIPS machine and the introduction of a microphone voice activated addition that caused the problems for the LIPS machine operators. Hutton explained the zero was moved to a different location on the keypad and as such created a problem.

Hutton testified he was asked by union steward Wersland, W-E-R-S-L-A-N-D, if he wanted to file a grievance over the keypad change. Hutton explained that the union steward said to him in the presence of four other employees "We are thinking of filing a grievance. If we do, do you wish to be considered." Hutton never filed a grievance nor expressed any concern or upset to the union about the keypad changes. Hutton explained in his testimony that the key change—keypad change simply "wasn't that big of a deal to me".

Flat sorter machine operator Darrell Linke, L-I-N-K-E, testified he had been a union member until one week before the trial herein. Linke testified he worked on the LIPS machine approximately two days per week before and after the company instituted the changes that it did on the keypad configuration

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for the LIPS machine. Linke testified he was aware of the grievances over the keypad changes and testified union steward Carol Muenkel, M-U-E-N-K-E-L, told him to file a grievance regarding the keypad.

Linke testified he had not made any complaints about the keypad change prior to the union steward making the above comments to him. Linke testified he never pursued or attempted to file a grievance. Linke testified he observed the settlement notice on the grievance on the union's bulletin board and talked with union steward Muenkel about it. Linke testified he asked Muenkel why he was not included and was told he should have filed a grievance. Muenkel told Linke according to Linke that individual grievances were filed because it would make the greatest impact on management and that non-union members would not be included.

Linke acknowledged on cross-examination that he could have filed a grievance but elected not to and that others on the crew that he worked on did in fact file grievances. Flat sorter machine operator Patrick Wall testified he was a union member from 1980 until April 2001. Wall testified he was getting out of the union for thirteen pay periods which he said he figured was the equivalent of the \$160.00 award the union got for the other employees in the LIPS machine grievance settlement but that the union did not get such for him.

Wall testified that in the fall of 1998 his crew was

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assigned to rotate for duty on the LIPS machine. Wall testified he thought the assignments to the LIPS machine should have been placed up for bid and he complained to the union about that fact. He testified he was also rotating onto the LIPS machine at the time the keypad changes were made. Wall testified he had conversations with union steward Carol Muenkel and Bret Wersland. He testified Wersland said to file a grievance but that Muenkel never said anything about filing one.

Wall testified he observed the posted settlement notice in March of 2000 and the copy he saw posted had written on the bottom of it "It pays to know your rights." Wall testified that two weeks after the posting of the settlement notice on the union bulletin board he spoke with local union vice president Martin Mater, M-A-T-E-R, about what had happened with the LIPS settlement. Wall testified Mater asked if he had read the language on the settlement, to which Wall said he responded he had and "I got screwed". Wall spoke with union steward Muenkel the next day to no satisfaction for him.

Employee Todd Yates testified that at material times herein he was a part time flexible flat sorter machine operator. Yates testified that when the keypad changes were made he complained to union steward Wersland and that Wersland told him, Yates, that he was a part time flexible employee and as such he would have to live with the changes that the Postal Service was instituting. Yates saw the settlement notice on the union

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bulletin board but never spoke with anyone from the union about it. Yates testified there were part time flexible employees on the settlement list.

One final witness called by the Government and gave testimony with respect to the issues herein was U.S. Postal Service labor relations specialist Andritsch who testified that on many occasions the union did file class action grievances.

The union then presented evidence with respect to what had transpired regarding the LIPS machine changes. Union president Raymer testified that individual grievances in this matter was the preferred manner in which to proceed because any individual employees affected could be specifically identified. He also stated individual employees came forward and filed the grievances individually.

Raymer testified that it was his considered opinion that individual grievances as opposed to a class action grievance would have a far greater impact on the Postal Service. Union president Raymer testified it was not the union's practice to solicit grievances and grievances were not specifically solicited in this matter. Raymer testified employees were told that if they felt aggrieved to file a grievance and if they did not to do so.

Union president Raymer testified that some of the affected union stewards for example filed grievances while other affected stewards did not. Raymer testified that with each separate

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grievance the individual filing the grievance attached a written statement of how the change on the keypad on the LIPS machine had specifically affected that individual employee. Union president Raymer explained that with individual grievances it could be documented specifically who had been harmed and to what degree, that it was not just for union officials or for a few but for those actually harmed.

Union president Raymer testified he had assisted Charging Party Wall on numerous occasions with problems Wall had on moving into and out of the facility in Madison. Union vice president Martin Mater testified he has known Charging Party Wall for an extended period of time and helped Wall on the transfers into and out of the Madison Area Postal Service. Union vice president Mater testified he specifically spoke with Wall and Pasell, P-A-S-E-L-L, about the LIPS machine and their assignment of work to the machine.

Vice president Mater testified he told the two that they should ask to file a grievance. Neither Wall nor Pasell elected to file a grievance. Mater testified that on his tour which was tour three on the pay location he was involved with, location 340 of that tour, that certain of the ten therein filed a grievance over the keypad change while others did not. Page 1 of Union Exhibit 3 as testified about by Mater indicates that of the ten employees he made reference to five filed grievances over the matter while five did not.

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It would appear that all ten were active union members. Union vice president Mater testified he had personal friends who did file grievances regarding the LIPS keypad change while

others of his personal friends did not. Mater explained for example that employee Jane Patterson did not feel the changes impacted her so she did not file a grievance.

Union steward Wersland testified he did not solicit employees to file grievances regarding the keypad changes on the LIPS machine but rather talked with the employees he came in contact with and told them "If they were upset to file a grievance". Wersland testified he spoke along the above-described lines with every employee on his crew including Charging Party Wall. Wersland testified some employees on his crew filed grievances while others did not.

Union steward Wersland testified he talked with employee Yates but asserted the conversation he recalled with Yates involved a matter where Yates was trying to complain about a bid position and that bid—and that Yates as a part time flexible employee was not eligible to bid on positions and as such was told that no relief would be forthcoming for Yates. Wersland specifically denied telling Yates he could not file a grievance over the keypad changes on the LIPS machine.

Wersland specifically testified he made no effort to keep nonmembers from filing grievances over the keypad change to the LIPS machine. Wersland likewise testified he was not aware of

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any effort by the union to discourage certain individuals from filing grievances while encouraging others to do so.

That is the highlight of the evidence that was presented in this case. Has the Government established by evidence in the form of testimony or exhibits that the union selected and/or encouraged 76 employees to file and thereafter process grievances related to the Employer's implementation of a new keypad on the linear integrated parcel sorter machine to the exclusion of the Charging Party and 80 other employees similarly affected.

Before I discuss further the evidence and make an application of it to the applicable principles that guide me I shall briefly state the principles that govern this type case. It is well settled that a union which enjoys the status of exclusive collective bargaining representative as the union herein does has an obligation to represent employees fairly, in good faith and without discrimination against any of them on the basis of arbitrary, irrelevant or invidious distinctions. *Vaca, V-A-C-A v. Sipes, S-I-P-E-S*, 386 U.S. 171 (1967).

A union breaches this duty when it arbitrarily ignores a meritorious grievance or processes it in a perfunctory manner or fails to even process a grievance that would appear to be meritorious. Again *Vaca v. Sipes* at 194. Also see *Hines, H-I-N-E-S v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). Correspondingly, so long as a union exercises its discretion in

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good faith and with honesty of purpose a collective bargaining representative is granted a wide range of reasonableness in the performance of its representational duties toward the unit employees.

For a union's actions to be arbitrary it must be shown that in light of the factual and legal landscape at the time of the union's action the union's behavior is so far outside a wide range

of reasonableness as to be irrational. *Airline Pilots v. O'Neill, O-'N-E-I-L-L*, 499 U.S. 65 at 67 (1991). Mere negligence, poor judgment or ineptitude in grievance handling are insufficient to establish a breach of the duty of fair representation. *Ford Motor Co. v. Huffman, H-U-F-F-M-A-N*, 345 U.S. 330 (1953).

Again, however, there comes a point where a union's action or its failure to take action is so unreasonable as to be arbitrary and thus contrary to its fiduciary obligations. Again even in applying the facts to the law herein there are certain points that are not in dispute. There was a settlement arrived at involving 76 grievances and the union posted the settlement on the union's bulletin board which stated among other things that 76 employees who had filed individual grievances were awarded \$160.00 each.

Did the Government establish what it alleges and if so does the action or inaction of the union demonstrate it failed to represent the Charging Party and similarly situated employees

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for reasons that are unfair and arbitrary in breach of its fiduciary duty that it owes to the employees it represents.

First it is clear grievances were not filed on behalf of or by every individual in the flat sorter machine operators classification which was the classification selected by negotiating between the union and the Employer to operate the LIPS machine. There does not appear on this record to be a challenge to the fact that approximately 76 filed grievances while approximately 80 did not. More specifically, has it been established that the union made a specific and/or concerted effort to include certain individuals in the filing of grievances and to attempt to exclude others from filing grievances for whatever reason.

The Government's contention is that the union's actions herein were specifically designed to preclude among others nonunion members from benefiting from the LIPS machine grievances. What evidence would support the Government's contention that the union wanted to exclude certain employees from the grievance action or the settlement of such grievances.

I think it is incumbent that you look to the testimony of employee Wedeward. He states there was a notation inked in at the bottom of the settlement agreement that was posted on the bulletin board stating it pays to be a union member. Does that in and of itself or in conjunction with other matters establish that the union took the action alleged in the complaint.

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Wedeward also testified about a conversation with union steward Carol Muenkel, M-U-E-N-K-E-L, two or three days after the settlement notice was posted and she told him that union president Raymer had instructed the union stewards to solicit as many employees as possible to bring more clout to the issue with management.

Wedeward also testified about a conversation he had with union president Raymer on April 12, 2000 in which he asked why he was not included in the settlement and was told that those who were included were the ones that came forward and filed a grievance. Wedeward further testified that he went back on April the 13th, 2000 to speak with Carol Muenkel, a union representative, and told her what union president Raymer had

said, that everyone who was awarded the \$160.00 in the settlement had come forward and individually filed grievances.

Wedeward testified that he told the union steward "That's not what you told me" and that the union steward didn't move away from it but simply said that union president Raymer sometimes says things and then forgets them. Employee Linke testified that union steward Muenkel told him to file a grievance over the keypad change but he did not. After the settlement was posted he spoke with the union steward about the settlement wondering why he was not included.

Union steward Muenkel told him he was told to file a grievance and did not and that individual

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grievances made a greater impact upon the Postal Service, and was also told that this was a means, manner or grounds that nonunion members would not be included in the settlement.

Does all of that establish that the union sought to include certain employees and exclude others in the filing of grievances related to the LIPS machine. One has to look further. Employee Wall testified the posted settlement agreement contained written language at the bottom of it that stated "It pays to know your rights". I note that that differs from what Wedeward said was at the bottom of the one he saw which was "It pays to be a member."

In looking further at whether the union had unlawful motivation in its action with the filing of the grievances related to the LIPS machine the Government would ask that I note, and I do, that there is some evidence in the newsletters of the union called "The News Flash" that it wanted everyone to be members of the union even to the extent of stating in its September, 1998 newsletter that it was tired of freeloaders and in negotiating a collective bargaining agreement with the Postal Service in 1998 those who were members would benefit while those who were not would be excluded from the benefits.

In its June, 1999 newsletter, again "The News Flash", the union published a nonmember list of the Madison, Wisconsin Area Local. That is it listed those employees that it contended were not members of the union. It is against this backdrop that I

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have just outlined that I shall explore the union's actions in light of the applicable law that I just made reference to.

Has the union by its actions or inactions exhibited a built-in unlawful bias against employees being nonmembers. The overall evidence would persuade me that the answer to that question is no. Certainly there is evidence that the union wants all unit members to join the union and it even prints lists of those whom it contends doesn't belong to the union and states its vivid distaste for freeloaders. However, none of the credited conduct established in this record would in its totality demonstrate the union would based on any built-in bias unlawfully refuse to represent nonunion members in the bargaining unit.

Did the union selectively solicit employees to file grievances or stated differently specifically exclude the Charging Party and other similarly situated from filing grievances based on arbitrary or unfair reasons or breach of its fiduciary duty. Did the union seek to benefit its members at the expense of or at the

exclusion of nonmembers. The answer on this record is again no.

The union president testified it was not the union's policy nor did they solicit grievances in this case. Union vice president Mater testified that the union did not solicit employees to file grievances and that there was no effort by the union to solicit specific grievances. Union steward

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Wersland testified that he did not solicit grievances, that when he talked with all of the employees in his unit he indicated if they were upset to file grievances.

Has the Government established that there was specificity with soliciting and/or precluding employees from filing grievances. The evidence to this point would indicate no. We further then come to some specific examples that the Government urges establishes that the union ignored certain grievances or complaints of employees while at the same time soliciting employees to file grievances who had not complained. A careful examination of those instances do not establish the Government's case.

Wedeward for example testified he was not asked to file a grievance and that he did not attempt to file a grievance. He was one of those that the Government contends complained about the situation but his complaints were ignored and he was not asked to file a grievance. But additionally Wedeward gave some very interesting testimony in that he stated he did not even know if he was affected by the changes of the keypad to the LIPS machine. Wedeward acknowledged that he had never encountered any personal problems or for that matter any other type of problems with the union stewards in the location that he worked.

As to employee Yates' testimony that he talked with union steward Wersland about the keypad changes and that Wersland told

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him there was nothing that could be done for him because he was a part time flexible employee is in my opinion an inaccurate recollection of what took place between he and union steward Wersland. I'm persuaded the discussion between Yates and Wersland was as Wersland testified to, that the discussion involved job bidding which Yates was not eligible for, rather than the keypad changes.

I'm fully persuaded based on the overwhelming weight of the evidence in this case that if Yates had sought to file a grievance on the keypad change to the LIPS machine that the union would have allowed him to do so and would have processed it. I base that in part on the fact that the settlement itself included PTF or part time flexible employees. Additionally, I specifically credit Wersland's testimony that he did not tell Yates he could not file a grievance.

Were the circumstances surrounding the soliciting of Hutton and Linke to file grievances establish any pattern or action on the part of the union to include certain individuals while excluding other individuals. The answer again is no. Hutton's own testimony shows that when union steward Wersland mentioned filing a grievance regarding the keypad change that four other employees were present. That taken in conjunction with

Wersland's testimony he did not solicit grievances but rather told employees if they were upset to file grievances persuaded me—persuades me there was no unlawful—there was no

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unlawfully motivated conspiracy on the part of Wersland and/or the union to unlawfully include some employees while excluding others.

Linke testified union steward Carol Muenkel, M-E-U-N-K-E-L, asked him to file a grievance about the keypad changes but that he did not do so. He said that later he did attempt to file a grievance. He knocked on the union's doors. There was nobody there. He never followed up on it. But Linke on cross-examination acknowledged that when the union steward spoke with him about filing a grievance the steward was talking to more than just one employee, that others were also present.

Thus I'm persuaded that these actions by the union specifically regarding employees Wedeward, Yates, Hutton and Linke do not establish any effort on the part of the union to unlawfully exclude some from filing grievances while unlawfully soliciting others to do so.

Next, did the union demonstrate arbitrary or unfair conduct or a breach of its fiduciary duty when it elected to proceed with the dispute regarding the LIPS machine by individual grievances versus a class action grievance. The union's explanation specifically through union president Raymer provides a reasonable explanation for the union's action. That is president Raymer testified that it was his considered opinion that the problem

with the LIPS machine would have far greater impact on the Postal Service if it was done by a large number of

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individually filed grievances so that the Postal Service could see the magnitude of the impact on the employees.

Did the union's action in that regard move it outside an exercise of its discretion in good faith and with honesty of purpose. I'm persuaded it did not move them outside that wide range of reasonableness that is afforded a union in the representation of the unit employees.

Did the union engage in some poor judgment in this case. Perhaps. If there were any comments inked in by the union at the bottom of their notice of this settlement while neither would appear to violate the National Labor Relations Act, either version of what may have been at the bottom of the note, perhaps it would have been better not there.

Do some of the articles that are printed by the union included in its "News Flash" represent exceptionally good judgment. Perhaps not but it does not rise to the level of placing the union outside its duty of fair representation.

Having carefully considered all of the evidence I find that the Government has failed to establish that the union acted in an unfair or arbitrary manner or that it breached its fiduciary duty to the employees it represents and as such I shall dismiss the complaint.

This hearing is closed.